Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
Implementation of Section 224 of the Act;	)	WC Docket No. 07-245
A National Broadband Plan for Our Future	)	GN Docket No. 09-51

OPPOSITION OF THE ALLIANCE FOR FAIR POLE ATTACHMENT RULES

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Duke Energy Corporation
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Pursuant to section 1.429 of the Federal Communications Commission's ("FCC" or "Commission") Rules, the American Electric Power Service Corporation, Duke Energy Corporation, Entergy Services, Inc., Florida Power & Light Company, Progress Energy, and Southern Company (collectively hereinafter "the Alliance for Fair Pole Attachment Rules" or "the Alliance"), by their counsel, hereby submit this Opposition to the Petition for Reconsideration or Clarification filed by a group of State cable associations and cable operators (hereinafter "State Cable Associations' Petition") in the above-referenced proceeding.[1]

[1] *In the Matter of Implementation of Section 224 of the Act A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Petition for Reconsideration or Clarification of the Alabama Cable Telecommunications Association, Bresnan Communications, Broadband Cable Association Pennsylvania, Cable America Corporation, Cable Television Association Of Georgia, Florida Cable Telecommunications Association, Inc., Mediacom Communications Corporation, New England Cable and Telecommunications Association, Ohio Cable Telecommunications Association, Oregon Cable Telecommunications Association, and South Carolina Cable Television Association (filed Sept. 2, 2010) ("State Cable Associations' Petition").

I. DESCRIPTION OF THE ALLIANCE

The Alliance is comprised of six companies that, collectively, serve electric consumers in 18 states and numerous metropolitan areas and own and maintain approximately 17.6 million electric distribution poles. The Alliance companies serve 12 of the 30 states in which pole attachments are regulated by the FCC.

Each of the Alliance's members owns or controls poles in states that are governed by the FCC's pole attachment authority and, as such, are vitally interested in issues affecting the integrity and use of their electric plants for communications purposes. Accordingly, the Alliance has a strong interest in the FCC's rules and policies related to pole attachments.

The Alliance's members have filed extensive comments and reply comments in the rulemaking docket that is the subject of the State Cable Associations' Petition. The Alliance understands that its members Florida Power & Light and Progress Energy are also separately filing today as members of a group of Florida investor-owned utilities ("Florida IOUs")[2] an opposition to the State Cable Associations' Petition.

II. SECTION 224 PROVIDES NO AUTHORITY FOR MANDATORY POLE REPLACEMENT.

The State Cable Associations urge the Commission to require electric utilities to replace poles to accommodate new attachment requests.[3] The Commission should reject the State Cable Associations' Petition because the requested relief would be contrary to the statute. Specifically,

[2] The Florida IOUs (i.e., Florida Power & Light Co., Tampa Electric Co., Progress Energy Florida, Inc., Gulf Power Co., and Florida Public Utilities Co.) have filed extensive comments in this proceeding as well as a petition for reconsideration of the Commission's declaratory ruling in this proceeding. *See* FNPRM Comments of Florida Investor-Owned Utilities (filed August 16, 2010); FNPRM Reply Comments of Florida IOUs (filed August 16, 2010); Petition for Reconsideration of and Request for Clarification of the Florida IOUs (filed September 2, 2010).

[3] *See* State Cable Associations' Petition at 14-15.

the Commission has no authority to compel electric utilities to replace existing poles for two reasons: (1) the access requirement of section 224 provides only for access to existing poles, not for the construction of new poles; and (2) the electric utility's right under section 224(f)(2) to deny access for reasons of insufficient capacity means that electric utilities have no obligation to expand capacity by replacing existing poles with higher-capacity poles.

A. Section 224 provides only for access to existing poles, not construction of new poles.

The State Cable Associations argue that section 224 supports their request that the Commission mandate pole replacement. They are wrong. Section 224 provides only for access to poles actually owned or controlled by the electric utility. Electric utilities have no obligation to replace existing poles, construct new poles, or otherwise to provide access to poles that do not yet exist. Section 224(f)(1), in relevant part, mandates that an electric utility shall provide a cable system or telecommunications carrier "with nondiscriminatory access to any *pole ... owned or controlled by it*."[4] Poles that do not yet exist are not poles "owned or controlled" by the electric utility. Section 224(f)(1) says nothing about constructing new poles or otherwise purchasing or taking control of new or different poles in the future. The statute means what it says: access pertains only to poles actually owned or controlled by the utility.

Moreover, section 224 as a whole addresses only attachments to existing poles. Nothing in section 224 suggests that the Commission has authority to mandate construction of new poles. The Commission's authority under section 224(b) is limited to review of rates, terms, and conditions of pole attachments as defined in section 224(a)(4), which provides that "pole

[4] 47 U.S.C. § 224(f)(1) (emphasis added).

attachment" means "any attachment … to a pole … owned or controlled by a utility."[5] The Commission's authority is thus limited to resolving disputes over access to existing poles; its authority does not extend to mandating the construction of new poles.

Because section 224 applies only to existing poles, the State Cable Associations' requested "clarification" lacks any statutory basis and should be rejected.

B. Mandatory pole replacement is contrary to the electric utility's right to deny access for reasons of insufficient capacity.

The State Cable Associations are, in effect, asking the Commission to compel electric utilities to increase capacity by replacing existing poles with taller poles. This request is directly contrary to the statute and established precedent. Under section 224(f)(2), an electric utility "may deny … access to its poles … where there is insufficient capacity …."[6] As numerous comments filed in this proceeding explain, it is well established that this right to deny access for reasons of insufficient capacity means, in turn, that electric utilities are not required to increase capacity to make room for new attachments.[7] The Commission previously attempted to mandate pole replacement, but was decisively reversed by the Eleventh Circuit in *Southern Co. v. FCC*.[8] In that case, the court held that "[s]ection 224(f)(2) carves out a plain exception to the general

[5] *See also* 47 U.S.C. § 224(a)(1) (defining "utility" as an entity that "owns or controls poles … used, in whole or in part, for wire communications").

[6] 47 U.S.C. § 224(f)(2).

[7] *See*, *e.g.*, FNPRM Comments of the Edison Electric Institute and Utilities Telecom Council at 34-35 (filed August 16, 2010); FNPRM Comments of the Alliance for Fair Pole Attachment Rules at 63 (filed August 16, 2010); NPRM Comments of Alabama Power, Georgia Power, Gulf Power, and Mississippi Power at 27-31, WC Docket No. 07-245 (March 7, 2008); NPRM Reply Comments of Ameren Services Company and Virginia Electric and Power Company at 22-3 (Apr. 22, 2008); Letter from Eric B. Langley and J. Russell Campbell, Balch & Bingham LLP, to Marlene Dortch, Secretary, FCC, at 3 (Apr. 13, 2009).

[8] 293 F.3d 1338 (11th Cir. 2002).

rule that a utility must make its plant available to third-party attachers."[9] As the court observed, "it is hard to see how this provision could have any independent meaning if utilities were required to expand capacity at the request of third parties."[10] Any attempt by the Commission to grant the State Cable Associations' petition by mandating capacity expansion would, therefore, be "outside the purview of its authority under the plain language of the statute"[11] and would "subvert[] the plain meaning of the Act."[12] Accordingly, the Commission should deny the petition and thus reject the State Cable Associations' transparent attempt to subvert the plain meaning of section 224.

WHEREFORE, THE PREMISES CONSIDERED, the Alliance for Fair Pole Attachment Rules respectfully requests that the Commission deny the Petition for Reconsideration or Clarification of the State Cable Associations.

Respectfully submitted,

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[9] *Id.* at 1346-47.

[10] *Id*. at 1347.

[11] *Id*.

[12] *Id*.